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Supreme Court of the United States

OCTOBER TERM 1940

No. 722

V. J. ADAMS, TRUSTEE FOR GENERAL BOX COMPANY, INC.,

Petitioner

vs.

CITY BANK & TRUST COMPANY OF MACON, GEORGIA,

Respondent

BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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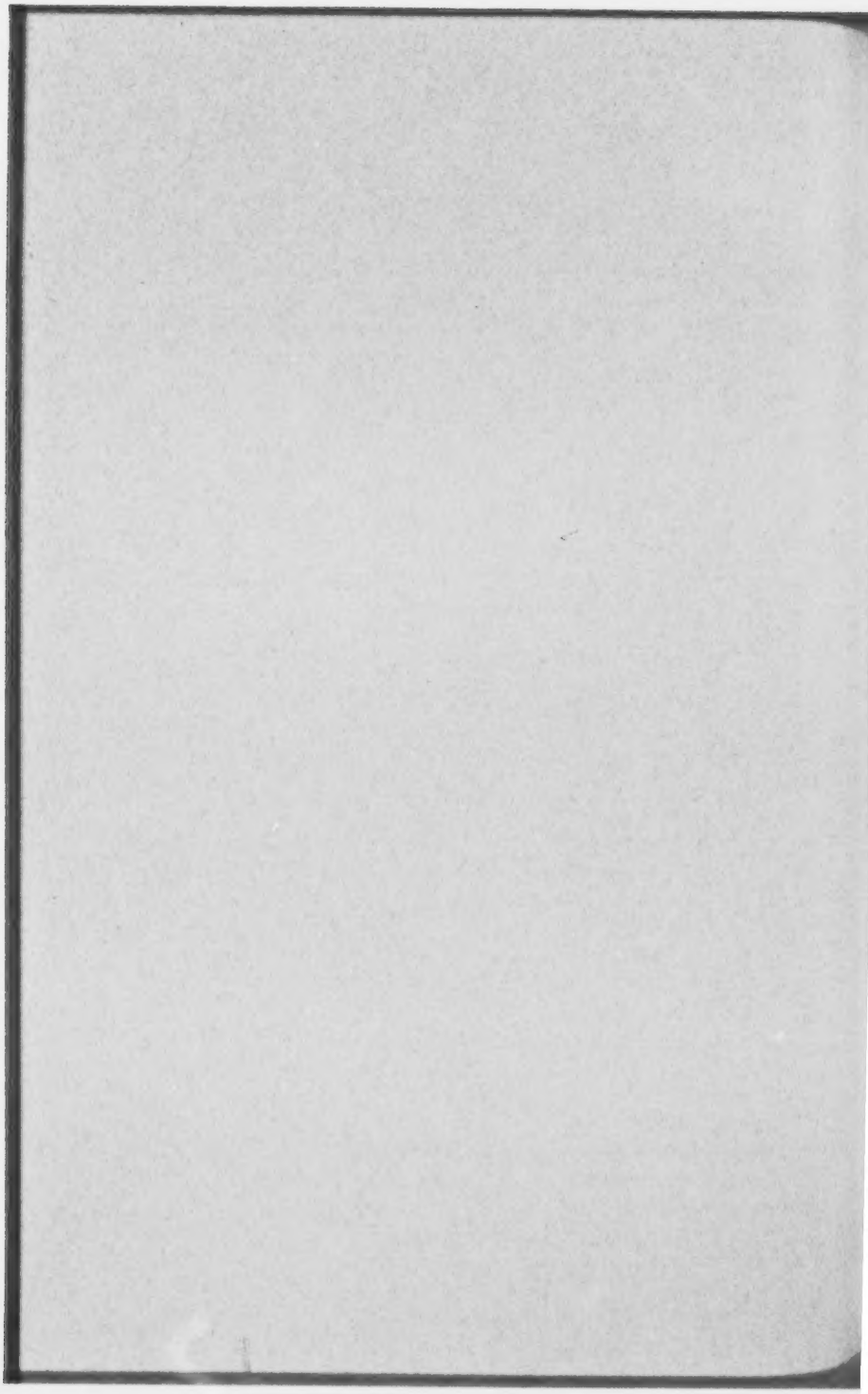

INDEX

Subject Index

	Page
Brief opposing grant of writ of certiorari	1
Statement relative to Court's Jurisdiction	1
Statement of the Case	1
The question presented	3
The opinion below	3
Brief of Argument	3

Table of Cases Cited

Adams, Trustee, v. City Bank & Trust Company, (5 CCA 1940) 115 F. (2d), 453	3-5
Bachner v. Robinson (2 CCA 1939) 107 F. (2d) 513	5
Barr & Creelman Co. v. Zoller (2 CCA 1940) 109 F. (2d) 924	5
Carey v. Donohue, 240 U. S. 430, 36 S. Ct. 386	8
Cunningham, In re, (4 CCA 1933) 64 F (2d) 296	8
First National Bank v. Live Stock National Bank, (8 CCA 1929) 31 F (2d) 416, 417	8
Foltz v. Davis, (7 CCA 1934) 68 F (2d) 495	9
Martin v. Commercial National Bank of Macon, 245 U. S. 513, 38 S. Ct. 176	8
Merchants & Mechanics Bank v. Beard, 162 Ga. 446, 134 S. E. 107	2
Powers v. Georgia Florida Grocery Co., 7 Ga. A 592, 67 S. E. 685	2
Small-Ferrer, Inc. v. Ware (4 CCA 1934) 68 F (2d) 366	9
Talbot Canning Corporation, In re, (D. C. Md. 1940), 35 F Supp. 680	5
Tiffany v. Boatman's Savings Institution, 18 Wall. 375-388, 21 L. Ed. 868, 871	6
Wadesboro, Bank of, v. Little (4 CCA 1934), 7 F (2d) 513	9
Webb, E. H. Grocery Co., In re, (D. C. Tenn. 1940), 32 F Supp. 3	5

Statutes Cited

Georgia Code 1933, §67-103 2

Other Authorities Cited

McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act (1937), 4 U. of Chi. Rev. 369, 394 (392) 12
Report No. 1409, H. R. 8046, July 29, 1937, 75th Congress, 1st Session 12

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BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI

I. STATEMENT RELATIVE TO COURT'S JURISDICTION

Respondent does not contest the jurisdiction of this Court to review the judgment of the Circuit Court of Appeals.

II. STATEMENT OF THE CASE

Respondent questions petitioner's statement of the matter involved only in respect to the following statement which appears on page 2 of the petition for writ of certiorari: "During the interval between the execution and recordation the bankrupt incurred debts and purchased on credit additional goods which augmented the stock mortgaged to the bank." We submit that this statement has no relevancy to the question at hand and is not justified by the record. One of the bills of

sale taken by respondent from the bankrupt covered a stock of goods changing in specifics. Under the Georgia law, such an instrument loses its lien "on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place."

Georgia Code 1933, §67-103.

Powers v. Georgia Florida Grocery Co., 7 *Ga. A.* 592, 67 *S.E.* 685.

Merchants & Mechanics Bank v. Beard, 162 *Ga.* 446, 134 *S.E.* 107.

There is nothing in the record to indicate that this stock was "augmented" by purchases between the date of its execution and the date of its record. The statement does appear in the record (page 4) that "the bankrupt had purchased substantial amounts of the materials referred to in items (b) to (f) of finding No. 10 since September 15, 1939, and it does not appear how much, if any, of such material sold by the trustee was on hand on September 15, 1939." But it nowhere appears what amounts of these materials were sold by the bankrupt between September 15, 1939, and December 19, 1939, so that it can not be said from the record that there was any augmentation.

The case was not submitted to the Circuit Court of Appeals or to the District Court or to the Referee on the theory that there was an augmentation of the bankrupt's stock between the date of the execution of the bills of sale and the date of their record, but the case was submitted on the contrary assumption, the question of augmentation not having been argued.

III. THE QUESTION PRESENTED

The question which was presented and which is here involved may be briefly stated in the language of the Circuit Court of Appeals as follows: "Does a bill of sale conveying personal property to secure an indebtedness simultaneously created become a preference voidable in bankruptcy, when subsequently recorded while the debtor is insolvent and within four months before the filing of the petition in bankruptcy, the creditor having reason to believe, at the date of filing for record, that the debtor is insolvent?"

IV. THE OPINION BELOW

The opinion below is reported:

Adams, Trustee, v. City Bank & Trust Company, 115 *F.* (2*d*) 453.

V. BRIEF OF ARGUMENT

As we read the petition for certiorari and the brief in support thereof, petitioner's reasons relied on for the allowance of the writ are:

(a) An important question of Federal law has been decided by the Circuit Court of Appeals, which has not been, but should be decided by this Court, and

(b) An orderly and uniform administration of the bankruptcy law calls for a settlement of this question by this Court; because

(c) Petitioner contends that the decision below manifestly misconstrues the Congressional intent expressed in Section 60 of the Chandler Act.

The first two of these reasons are really one and

the third reason is one which can not with propriety be extensively discussed in this brief. Since the petitioner has devoted a considerable portion of his discussion to the argument that the decision of the Court below is erroneous, it does seem necessary that we at least present briefly, but as clearly as possible, the basic reasons why we think the decision of the Court below should not be disturbed. It is, of course, true that whether the question "should be decided by this court," depends to some extent upon whether there was manifest error in the decision of the Circuit Court of Appeals.

It seems that a rather short time has elapsed since the enactment of the Chandler Act for anyone to say dogmatically whether or not the question here presented is of sufficient importance to necessitate a decision by this court. Our experience in bankruptcy practice leads us to believe that the question is not one which is likely to recur frequently and certainly not to involve substantial amounts of money. Those instruments which are given to secure substantial amounts of money are according to commercial usage recorded promptly after their execution as the creditor is not willing to run the risk that other liens might intervene.

But if we assume that the question is of great importance it still does not follow that a decision by this court is necessary. Those cases in which the question here involved has been raised have been decided without conflict and a denial of the writ of certiorari in the instant case would seem to be the proper course unless and until there has been some conflict among the decided cases.

Since the enactment of the Chandler Act there have been three reported decisions, among them the instant

case, construing Section 60 of the Chandler Act in the light of the question here presented.

In re E. H. Webb Grocery Co. (*D. C. Tenn.* 1940) 32 *F. Supp.* 3.

Adams, Trustee, v. City Bank & Trust Co., (5 *CCA* 1940) 115 *F.* (*2d*) 453.

In re Talbot Canning Corporation (*D. C. Md.* 1940) 35 *F. Supp.* 680.

In all of these cases the same conclusion was reached, that a conveyance to secure a present debt is not a preference although it is subsequently recorded within four months of bankruptcy at a time when the grantee had reasonable cause to believe that the grantor was insolvent.

Two other decisions have been rendered since the enactment of the Chandler Act and have held that there can be no preference unless the conveyance was in fact given to secure an antecedent debt, thereby diminishing the estate of the bankrupt. These decisions are in accord with the instant case but can not be cited as direct authority since they did not discuss the effect of the Chandler Act. They are:

Barr & Creelman Co. v. Zoller (2 *CCA* 1940) 109 *F.* (*2d*) 924.

Bachner v. Robinson (2 *CCA* 1939) 107 *F.* (*2d*) 513.

We submit that the combined authority of all of these decisions indicates the improbability of the development of a conflict on the question here involved.

We, therefore, submit that it is unnecessary in

the ends of justice to grant a writ of certiorari in this case unless the decision of the Court below is manifestly wrong. In order to demonstrate that the decision of the Court below was correct we will set out as briefly as possible the history of Section 60 of the Bankruptcy Act of 1898 and the purposes, as we understand them, of its revision in the Chandler Act.

It has long been the rule, even before the Act of 1898, that the preference to which bankruptcy law is directed "can only arise in case of an antecedent debt," because "to secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property - - -. But the giving securities when the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid."

Tiffany v. Boatman's Savings Institution, 18 *Wall.* 375-388, 21 *L. Ed.*, 868, 871.

Petitioner argues that in enacting Section 60 of the Chandler Act Congress was undertaking to change this rule and to strike down all secret liens whether or not given to secure antecedent debts. We contend, on the contrary, that Congress intended to, and did, expressly reaffirm this rule in the enactment of Section 60 of the Chandler Act by defining a preference as a "transfer - - - for or on account of an antecedent debt - -." We contend that the legislative history of Section 60 clearly supports our position.

It has always been thought necessary in defining a voidable preference to fix some arbitrary time limit within which a preferential transfer may be attacked in or-

der that there may be some time at which a transaction can be considered closed. Under the Act of 1898 and under the present Act this arbitrary time limit was fixed at four months.

Early in the administration of the Act of 1898 it became apparent that it was feasible for a debtor and his favored creditor to avoid the provisions of the Act as to preferences by concealing the fact of the preference for four months. It was, therefore, thought advisable to extend the time within which a preference might be attacked to a date four months from the time when the fact of the preference could be ascertained by other creditors. In an amendment to Section 60 in 1910 in order to carry this intention into effect, Congress provided that "where the preference consists of a transfer such period of four months shall not expire until four months after the date of record - - if by law such recording - - is required." As originally drafted the proposed amendment had provided "if by law such recording - - - is required or permitted," but the words "or permitted" were omitted in the bill as it passed Congress. It was seriously contended that under this amendment the period of four months would not begin to run until the date of record where state laws "required" the instrument to be recorded in order to protect the transferee against the claims of bona fide purchasers. This Court, however, held that the words "is required" referred to a requirement of record to protect the transferee against someone represented by the Trustee in Bankruptcy. Accordingly, where the Trustee in Bankruptcy represented only general creditors and where the state law did not require record to protect the right of the transferee against the claims of general creditors, the transfer for an antecedent debt would not

be preferential even though recorded within the four months' period.

Carey v. Donohue, 240 *U. S.* 430, 36 *S. Ct.* 386.

Martin v. Commercial National Bank of Macon, 245 *U. S.* 513, 38 *S. Ct.* 176.

In so holding this Court emphasized the fact that the word "required" was not synonymous with the words "required or permitted." Perhaps in an effort to obviate the effect of this decision, Congress in 1926 amended Section 60 (a), which defines a preference, by adding the words "or permitted." However, Congress failed to add the words "or permitted" to Section 60 (b), which dealt with the right of the Trustee to avoid preferences.

The effect of this 1926 amendment was not submitted to this Court. Under it the Circuit Courts of Appeals had rendered conflicting opinions as to the right of a trustee in bankruptcy to avoid as a preference a transfer to secure an antecedent debt made more than four months prior to bankruptcy but recorded within the four months' period. The Fourth and Eighth Circuits held that by its failure to add the words "or permitted" in Section 60 (b) Congress manifested an intention to make it an act of bankruptcy within the meaning of Section 3 (b) to record a transfer to secure an antecedent debt within the four months' period, without at the same time giving the right to the trustee to avoid such a transfer as a preference.

First National Bank v. Livestock National Bank (8 *CCA* 1929) 31 *F* (2*d*) 416, 417.

In re Cunningham (4 *CCA* 1933) 64 *F* (2*d*) 296.

Bank of Wadesboro v. Little (4 *CCA* 1934) 71 *F* (2*d*) 513.
Small-Ferrer, Inc. v. Ware (4 *CCA* 1934) 68 *F* (2*d*) 366.

Under these decisions a creditor could institute involuntary proceedings in bankruptcy in many instances where such a procedure would be at most a bare right, because the creditor could not, through the trustee, recover the assets preferentially disposed of.

Reading Sections 60 (a) and (b) together the Seventh Circuit held that the amendment of 1926 was passed by Congress for the purpose of changing the rule laid down by this Court in *Carey v. Donohue*, 240 *U. S.* 430, 36 *S. Ct.* 386, and that the trustee could avoid as a preference a transfer for an antecedent debt made before but recorded within the four months' period.

Foltz v. Davis (7 *CCA* 1934) 68 *F* (2*d*) 495.

This case was followed in the case of in re *Jackson* (*D. C. Ark.* 1935) 9 *F. Supp.* 717, in which the Court reconciled it with the decisions of the Eighth and Fourth Circuits by pointing out that in the cases decided by the latter courts the transfers were in fact for a present consideration whereas in the Seventh Circuit the transfer under consideration was for a pre-existing debt.

Thus, as the law stood at the time of the enactment of the Chandler Act, there was no question whatever but that a transfer for a present consideration was not a preference regardless of the date of its record. The question which was still the subject of conflicting opinions was whether or not the trustee in bankruptcy could avoid a transfer for an antecedent debt made more than

four months prior to bankruptcy but recorded within the four months' period where the state law did not require record as against general creditors.

Keeping in mind that the original purpose of extending the period within which to attack a preferential transfer to a date four months after the date of recording was to prevent the debtor and his preferred creditor from keeping the fact of the preference secret until an attack by the Trustee in Bankruptcy would fail because the period of four months had already elapsed, there would seem to be no practical reason to impute to Congress an intention to change the long-standing rule that transfers to secure present advances are not preferences. Under the 1898 Act it frequently occurred that creditors who did not participate in a conveyance to secure an antecedent indebtedness were ignorant of their right to file an involuntary petition until it was too late for the trustee to avoid the conveyance. The present Section 60 was apparently designed to, and does, cover this situation.

On the contrary, a transfer for a present debt was not considered to be a preference and did not give rise to the right of a debtor to file an involuntary petition in bankruptcy against the debtor. Since the creditor had no such right, it was immaterial to him whether such a transfer was recorded or not, assuming that no fraud was in fact praticed upon him. Thus, there would seem to be no point for Congress, in dealing with preferences, to require the record of a transfer for a present consideration any particular length of time before bankruptcy. We are unaware of a "long and insistent demand of credit associations and others concerned in the administration of the bankruptcy law," to which petitioner adverts without citation, for the avoidance in bank-

ruptcy of transfers for present consideration as preferences, despite the fact that Sections 67 and 70 afford ample remedy for their avoidance if they are fraudulent in fact.

Had Congress intended to avoid transfers similar to those presently under consideration, we submit that it would have used clear language unmistakably manifesting that intention, instead of so clearly stating that a preference is a "transfer - - - for or on account of antecedent debt."

We further submit that had Congress intended such a result, it is more than probable that it would have dealt with the matter in Section 67 (d) or in Section 70 (e), which treat of fraudulent conveyances, rather than in Section 60 which deals with preferences.

A practical consideration making against the construction for which petitioner contends is the absence of any provision for a period of time within which a transfer may be recorded without being considered to be given "for or on account of an antecedent debt." In practice there is almost always an interval of time between the giving of security and its record. Thus, no matter how short the interval of time might be, the petitioner must of necessity contend that the security would be for an antecedent debt, since a bona fide purchaser could acquire rights superior to those of the transferee in the interval between the giving of the security and its record. The answer is that Congress did not intend to define "antecedent" in the second sentence of Section 60 (a) but was dealing with the date as of which the insolvency would be determined and the date as of which the four months' period would begin to run.

On page 12 of his brief petitioner argues that the report of the House Committee on Section 60 and an article by Professor McLaughlin indicates the Congressional intention to have been as petitioner contends. It seems clear, however, that both the Committee and Professor McLaughlin were speaking of preferential transfers and not of transfers for present consideration. Had they understood Section 60 as finally enacted to have the effect of rendering transfers for present consideration invalid, much clearer language could have been used to accomplish that effect. On the contrary, it seems from the entire context that the secret liens to which they refer were secret liens for antecedent debts. Had they intended such a radical change in the law, and petitioner admits on page 4 of the petition that the construction for which he contends is a "radical" change, is it not reasonable to suppose that the Committee and Dr. McLaughlin, or at least one of them, would have called specific attention to the proposed change?

So far as the petition and brief in support thereof disclose, one would infer that the sole purpose which Congress had in mind in revising the wording of Section 60 was to accomplish the result for which petitioner contends. However, if we read the entire report of the House Committee, which is set out on page 11 of the Record, it will be apparent that the rewording was necessary principally in order to fix a date on which to apply the percentage test for the purpose of determining whether the transfer would enable the "creditor to obtain a greater percentage of his debt than some other creditor of the same class," and we submit that the report does not show any purpose on the part of Congress to accomplish the result for which petitioner contends. On the other hand, we submit that the report is entirely

consistent with the purpose on the part of Congress to accomplish the result which we have outlined herein.

In conclusion we submit that the construction placed upon Section 60 by the Circuit Court of Appeals is entirely consistent with the recorded proceedings in Congress and is the only proper interpretation to be placed upon the language employed by Congress whether we seek to determine the Congressional intent from the plain language employed, without considering extrinsic circumstances, or from that language viewed in the light of the contemporaneous circumstances affecting the legislation. In view of this fact and in view of the fact that the decision of the Circuit Court of Appeals is in accordance with all other decisions upon the question, we submit that the writ of certiorari should be denied.

Respectfully submitted,

A. O. B. SPARKS.

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